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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of appellant. Appellant has consented to the filing of the brief. The motion is necessary because appellee has denied consent.

The *amici*, organizations whose members include municipal and county governments and officials through-

out the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the validity of a temporary minority set-aside program adopted by the City of Richmond, Virginia. The program provides that any firm awarded a construction contract by the City shall, unless it receives a waiver, subcontract 30% of the value of the contract to minority business enterprises (MBEs). A narrowly divided court of appeals held that the Plan violates the Equal Protection Clause.

This case is of exceptional importance to *amici* because minority set-aside programs like Richmond's are very common among state and local governments. At least thirty-two States and 160 local governments currently have such programs.[1] As we explain below, the court of appeals' decision jeopardizes many of these programs. Moreover, the decision has significant adverse implications for the values of federalism in this sensitive and important area. For these reasons, we believe that our perspective can assist the Court in its determination whether to grant plenary review in this case. We accordingly move for leave to file the attached brief *amicus curiae*.

1. The minority set-aside programs enacted by state and local governments were generally adopted after this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a set-aside program enacted by Congress. Many of these state and local programs, including Richmond's, were modeled on the federal program upheld in *Fullilove*.

As we explain in the attached brief (pages 5-7, 12) the effect of the court of appeals' decision is to subject state and local set-aside programs to significantly more

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[1] Report of the Minority Business Enterprise Legal Defense and Education Fund (Jan. 1988). A copy of the report has been lodged with the Clerk and sent to the parties.

stringent constitutional requirements than *Fullilove* imposes on the federal government. Because so many state and local programs were adopted in reliance on *Fullilove*, the court of appeals' decision, if it prevails, will jeopardize set-aside programs throughout the Nation.[2] Indeed, the courts of appeals are currently sharply divided on issues raised by minority business set-aside programs.[3] State and local governments are therefore unsure how to proceed in this important area.

2. In addition to imperiling literally hundreds of important state and local programs, the court of appeals' approach threatens important values of federalism. Because the court of appeals in this case has imposed on state and local governments more exacting requirements than *Fullilove* applied to the federal government, state and local governments face an unjustified double standard. The federal government, in the exercise of its spending power, is permitted to prescribe remedies for past discrimination that apply in every state and every municipality. But in identical circumstances, state and local governments—with their vastly greater familiarity with

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[2] We note in this connection that a trade association of contractors that opposes minority set-aside programs has announced an intention to use the court of appeals' decision in this case as a weapon in its legal and political efforts to eliminate existing programs and to prevent the enactment of others. "President's Page," *Constructor* at 5 (Oct. 1987).

[3] See *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987); *Associated General Contractors v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing pending); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *South Fla. Chapter of Assoc. Gen. Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982).

local history and conditions—are disabled from acting similarly to remedy discrimination.

For example, the federal Small Business Act requires certain contractors with the federal government to have a subcontracting plan that includes percentage goals for the utilization of small business concerns owned and controlled by socially and economically disadvantaged individuals (defined to include racial minorities). 15 U.S.C. § 637(d)(6)(A).[4] This requirement is not even explicitly remedial; it is designed to implement "the policy of the United States" that such businesses "have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1). Within the City of Richmond, and within hundreds of other cities and counties in the Nation, private contractors are subject to this federal requirement. But under the court of appeals' decision, Richmond and other state and local governments are sharply limited in their ability to impose such requirements on private contractors, even to remedy the effects of prior discrimination. This result inverts important principles of federalism.

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[4] Other federal programs provide for similar racial preferences or set-asides. For example, absent a waiver, 10% of the funds appropriated under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151, must be set aside for the activities of economically and socially disadvantaged enterprises, among others. Omnibus Budget Reconciliation Act of 1987, 133 Cong. Rec. H12434 (daily ed. Dec. 21, 1987). Regulations under the Pennsylvania Avenue Development Corporation Act of 1972 require developers to submit affirmative action plans, and suggest, as minimum affirmative action goals, that 15% of the total dollar value of construction contracts, and 20% of the contracts for professional and technical services and materials and supplies, be awarded to minority-owned businesses. 36 C.F.R. § 906.1(a), (c); 906.3(a); and Exhibit A (1987). The Indian Self-Determination and Education Assistance Act of 1974 authorizes preferences to Indians in certain construction contracts and in the award of subcontracts and subgrants. 28 U.S.C. § 450e(b).

The double standard is especially troublesome because many federal grant programs require state and local governments to have set-asides as a condition of receipt of federal funds. For example, the Public Works Employment Act of 1976, which was upheld in *Fullilove*, requires state and local government grantees to spend at least 10% of the grant for minority business enterprises. 42 U.S.C. § 6705(f)(2).[5] But at the same time, under the court of appeals' decision, Richmond and other state and local governments are prohibited from deciding for themselves that the remedy that will best address the effects of discrimination in their own locality is a similar set-aside of state and local government contracting dollars. As a result, state and local governments find themselves in the position of carrying out federal remedial mandates while they are precluded from enacting their own remedial programs tailored to local conditions.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and be-

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[5] Numerous other federal programs contain similar set-aside requirements. In the absence of a waiver, not less than 10% of the funds appropriated under the Surface Transportation and Uniform Relocation Assistance Act of 1987 are set aside for small business concerns owned and controlled by socially and economically disadvantaged individuals (Pub. L. No. 100-17, § 106(c), 101 Stat. 145-46); the Department of Transportation's implementing regulations under the prior version (Pub. L. No. 97-424, § 105(f), 96 Stat. 2100) require recipients of federal-aid highway funds and urban mass transportation funds to "set and meet overall disadvantaged business goals of at least ten percent." 49 C.F.R. § 23.61(b) (1986). Regulations governing the award of Community Development Block Grants establish a selection system that provides points to applicants that have, for the last two years, awarded 5% to 20% (depending on the percentage of minority population) of the dollar value of their contracts to minority owned and controlled businesses. 24 C.F.R. § 570.424(d)(2); 570.428(d)(2) (1987). See also *id.* § 570.459(m) ("HUD will more favorably consider" Urban Development Action grant proposals for projects in which minorities are participants).

cause *amici*'s perspective may help illuminate the significant and troubling federalism implications of the court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of appellant.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Equal Protection Clause prohibits the City of Richmond from remedying the effects of racial discrimination on minority participation in city construction contracts by enacting a temporary program that, subject to a waiver provision, requires contractors to subcontract a portion of their contracts to minority business enterprises.

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. In July 1983, the Richmond City Council adopted a Minority Business Utilization Plan. The Plan provides that a contractor who is awarded a construction contract

by the City shall, unless granted a waiver, subcontract at least 30% of the value of the contract to minority business enterprises (MBEs).[1] J.S. App. 2a. The Plan is explicitly "remedial" (J.S. Supp. App. 248) and temporary: it expires at the end of June 1988 (*ibid.*).[2]

The City Council adopted the Plan after holding a hearing during which it received testimony and information about the history of public construction contracting in Richmond. The Council learned that during the preceding five years, only two-thirds of 1% of the dollar value of construction contracts awarded by Richmond was awarded to MBEs. J.S. Supp. App. 38, 115. The population of Richmond is approximately 50% minority. *Ibid.* The City Manager and a member of the City Council stated, on the basis of their experience, that there was widespread discrimination in the construction industry in general and in Richmond in particular; opponents of the Plan within the Council, and representatives of contracting associations who spoke at the hearing, did not dispute these statements. *Id.* at 38, 164-165. The City also relied on findings made by Congress, when it enacted a comparable program for federal construction funds—the program upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)—that "low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects

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[1] The Plan contains a detailed definition of which businesses qualify as minority business enterprises; essentially it requires minority ownership and either minority control or minority operation. See J.S. Supp. App. 115-116, 251-252. A general contractor that is itself a minority business enterprise need not subcontract 30% of its contract to other MBEs. *Id.* at 247. The Plan also provides that the City must verify that an enterprise claiming to be an MBE is not a sham. See *id.* at 62.

[2] Appellee seeks damages in addition to declaratory and injunctive relief. Thus, the case will not become moot when the Plan expires. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978).

of past discrimination." J.S. Supp. App. 165; see *Fullilove*, 448 U.S. at 465-467.

2. In September 1983, the City invited bids on a project that involved the installation of certain plumbing fixtures in the City Jail. Appellee was the only bidder. After the bidding was closed, appellee sought a waiver of the requirement that it subcontract with an MBE. J.S. App. 2a-3a; J.S. Supp. App. 120-124. The City declined to grant the waiver and, when appellee sought to increase the price of its contract with the City, the City reopened the bidding on the contract. The City invited appellee to submit a new bid. J.S. App. 3a.

Instead, appellee brought this action, which was removed to the United States District Court for the Eastern District of Virginia. Appellee sought injunctive and declaratory relief and damages, claiming, among other things, that the Plan violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The district court rejected appellee's claims (J.S. Supp. App. 110-232), and the court of appeals affirmed (*id.* at 1-109). This Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986). See 106 S. Ct. 3327 (1986).

3. On remand, a divided court of appeals reversed the judgment of the district court and held the Plan unconstitutional. J.S. App. 1a-26a. The majority acknowledged that, under *Wygant* and *Fullilove*, a City may use a racial preference in order to "redress a practice of past wrongdoing" (J.S. App. 14a). But the majority ruled that the Richmond Plan was invalid because there was "no record of prior discrimination by the city" in this case. *Id.* at 6a.

Specifically, the majority asserted that the statements made during the City Council hearing were not sufficient

to support the Plan because they were "conclusory" and "highly general," and some were made by supporters of the Plan. J.S. App. 6a. The majority also rejected as "spurious" (*id.* at 8a) the City's argument that an inference of discrimination was raised by the virtual absence of city contracts awarded to minorities, even though minorities constituted half the City's population. The majority stated that this disparity did not "demonstrate discrimination" because "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

The majority also concluded that even if the Plan were supported by the need to remedy past discrimination, it would be unconstitutional because "it is not narrowly tailored to that remedial goal." J.S. App. 11a. The majority asserted that the 30% figure was chosen "arbitrarily"; that the definition of an MBE was not narrowly tailored; that the provision for a waiver was too "restrictive"; and that the temporary nature of the plan was immaterial because "[w]hether the . . . [P]lan will be retired or renewed in 1988 is, at this point, nothing more than speculation." *Id.* at 11a-13a.

Judge Sprouse dissented. J.S. App. 14a-26a. The court of appeals denied rehearing en banc by a vote of 6-5. *Id.* at 27a-28a.

ARGUMENT

The court of appeals' decision is inconsistent with decisions of this Court and imposes unreasonable and impractical requirements on state and local governments that seek to remedy past discrimination. Moreover, the approach of the court of appeals, if it were to prevail, would potentially affect nearly two-thirds of the States and literally hundreds of local governments, all of which have adopted programs, similar to Richmond's, that are designed to overcome the effects of past discrimination

against minority business contractors. Plenary review is therefore warranted.

1. Richmond's Minority Business Utilization Plan—like the similar programs of many other state and local governments [3]—was modeled on the federal program that this Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The *Fullilove* program required that 10% of the federal funds awarded for local public works programs be used to procure services and supplies from MBEs. See 448 U.S. at 453-454 (opinion of Burger, C.J.). The various opinions in *Fullilove* explained that this program was constitutional because it was a legitimate effort to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478; see *id.* at 499-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment).

The court of appeals' approach in this case is utterly inconsistent with *Fullilove*. For example, the court of appeals condemned as "spurious" and "not . . . meaningful" the overwhelming disparity between the percentage of minorities in Richmond's population and the percentage of public contract funds that had been awarded to minorities. J.S. App. 8a, 10a. But in *Fullilove*, a majority of the Members of this Court relied on precisely the same statistical comparison to support their conclusion that Congress was acting to remedy past discrimination. See 448 U.S. at 459 (opinion of Burger, C.J.) ("[I]n fiscal year 1976 less than 1% of all federal government procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population"); *id.* at 511, 513 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). Indeed, in *Fullilove* the statistical disparity was

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[3] See Motion for Leave to File Brief of the National League of Cities, *et al.*, *supra* [hereinafter "Motion"].

far less dramatic than the 0.67% to 50% disparity that Richmond faced.

Similarly, the court of appeals disparaged the City's waivable 30% goal as an "arbitrar[y] . . . figure [that] simply emerged from the mists." J.S. App. 11a. *Fullilove* rejected a similar attack on the 10% figure used by Congress. Justice Powell explained that the use of a 10% set-aside was warranted because that figure fell approximately "halfway between the present percentage of minority contractors and the percentage of minority groups in the Nation." 448 U.S. at 513-514 (Powell, J., concurring). See also *id.* at 488-489 (opinion of Burger, C.J.). There were almost no minority contractors in Richmond (see J.S. Supp. App. 164), which has a minority population of 50%. The City's choice of a waivable 30% goal is therefore firmly supported by Justice Powell's logic.

The court of appeals' approach to the non-statistical bases of the Richmond Plan is similarly irreconcilable with *Fullilove*. The court of appeals discounted the statements, made during the Richmond City Council's hearing, that contracting practices and the construction industry in Richmond had been marked by discrimination, on the ground that these statements were "conclusory," "general," and often made by supporters of the Plan. J.S. App. 6a. But in *Fullilove*, a majority of the Members of this Court relied on statements of comparable generality made either by supporters of the federal plan or by members of a congressional subcommittee who supported a similar federal program to aid minority enterprises. See 448 U.S. at 458-463 (opinion of Burger, C.J.); *id.* at 504 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). The court of appeals suggested that the City's plan was invalid because "[t]here has been no showing that qualified minority contractors who submitted low bids were passed over [or] . . . that minority firms were excluded from the

bidding pool." J.S. App. 8a. But this Court cited no such evidence in *Fullilove*.[4]

2. Not only is the court of appeals' approach inconsistent with *Fullilove*, but it wholly disregards the practical difficulties faced by state and local governments when they attempt to remedy the effects of discrimination. For example, in rejecting the statistical disparity on which the City relied—the disparity between the number of contracts awarded to minorities and the minority population of the City—the court of appeals asserted that "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

Justice O'Connor has recently explained why this reasoning is wrong: when discrimination prevents minorities from "obtaining th[e] experience" that they need to qualify for a position, the "relevant comparison" is not

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[4] In addition, of course, the City had before it the same evidence that Congress had when it enacted the *Fullilove* program—"direct evidence . . . that [a] pattern of disadvantage and discrimination existed with respect to state and local construction contracting" (*Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)). This Court has ruled that in regulating in an area involving First Amendment rights, a City is "entitled to rely on the experiences of . . . other cities, and in particular on [other] 'detailed findings' . . . . The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). It follows *a fortiori* that specific congressional findings about discrimination in state and local contracting practices, found by this Court to be supported by "abundant evidence" (*Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.)), can form a basis for the City's actions.

The City Council also had available to it evidence pertaining to Richmond's own history. See, *e.g.*, *Bradley v. School Board*, 462 F.2d 1058, 1061, 1065 (4th Cir. 1972) (en banc), aff'd by an equally divided Court, 412 U.S. 92 (1973).

with the percentage of minorities who have experience but with "the total percentage of [minorities] in the labor force." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1462 (1987) (O'Connor, J., concurring in the judgment). Discrimination discourages and prevents minorities from entering the pool of contractors. See J.S. App. 20a & n.11; J.S. Supp. App. 167, 180. The Court has recognized that entrenched hiring discrimination will deter minorities from applying for jobs;[5] *a fortiori*, discrimination will discourage minorities from forming contracting firms, a much more expensive and difficult task than simply applying for a job. The absence of a significant disparity between the number of minority contracts and the number of minority contractors may simply be evidence that minorities, faced with impenetrable discrimination, did not quixotically enter a business in which they knew they would not be allowed to succeed.

Faced with the undisputed fact that there were essentially no minority contractors in a City that was half minority, the Richmond City Council could have concluded either that virtually no minorities were willing and able to become contractors, or that some appreciable percentage had been excluded by discrimination. The Council, with its intimate knowledge of the City's history, thought the latter hypothesis was more plausible. The court of appeals suggested no adequate reason for denying the City the right to reach this conclusion. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977); *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment).

Similarly, the court of appeals dismissed the nonstatistical evidence advanced by the City because it was general in nature and did not specify discriminatory

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[5] See, *e.g.*, *Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3036-3037 (1986); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-367 (1977).

acts. See J.S. App. 8a, 10a. But as Members of this Court have admonished, a legislative body, such as a City Council, does not function by making "specific factual findings with respect to each legislative action." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring); see *id.* at 478 (opinion of Burger, C.J.). Elected state and local representatives bring to bear knowledge that they have gathered over their entire tenure in office from a wide range of sources, including their general experience in public life and their contacts with constituents. This collective knowledge cannot be cabined in "findings" (J.S. App. 5a) or "showing[s]" (*id.* at 8a) about specific acts of discrimination.

In addition, as the Court has often pointed out, a specific admission of past discrimination could expose a state or local government to liability in damages; requiring such an admission would, therefore, deter voluntary efforts to eradicate the effects of past discrimination. See, *e.g.*, *Johnson*, 107 S.Ct. at 1451 & n.8, 1457; *Firefighters v. Cleveland*, 106 S.Ct. 3063, 3072 (1986); see also *Steelworkers v. Weber*, 443 U.S. 193, 204 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

But perhaps most important, state and local governments that address the problem of past discrimination seek to remedy it and to move on to new issues without reopening old wounds. The court of appeals' approach would force state and local governments that wish to remedy past discrimination to engage in accusations and recriminations directed at specific actors. Such a divisive process would benefit no one.

3. The court of appeals relied entirely on *Wygant* to justify its ruling. The court of appeals interpreted *Wygant* to require "findings" of prior discrimination and, in this case, a showing of a statistical disparity between the percentage of minority contractors and the

percentage of contracts awarded to minorities. J.S. App. 5a.

Wygant imposed no such requirements. See *Johnson*, 107 S. Ct. at 1462 (O'Connor, J., concurring in the judgment) (when past discrimination has prevented entry into a specialized labor market, *Wygant* requires only a comparison "to the total percentage of [minorities] in the labor force."). At most, *Wygant* required that governments have "a strong basis in evidence" or "a firm basis for believing that remedial action is required." *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring). Indeed, one Member of the five-Justice *Wygant* majority carefully explained why—contrary to the majority below—specific, contemporaneous "findings" of discrimination should *not* be required. *Id.* at 1854-1856 (O'Connor, J., concurring).[6]

The Court invalidated the affirmative action plan at issue in *Wygant*—a plan that afforded minority school teachers greater protection against seniority-based layoffs—for two reasons, neither of which is applicable to the Richmond Minority Business Utilization Plan. First, the affirmative action measure in *Wygant* was designed to maintain a certain ratio between the percentage of minority teachers and the percentage of minority students. See 106 S. Ct. at 1847 (plurality opinion); *id.* at 1857 (opinion of O'Connor, J.) As several Members of the Court pointed out, any disparity between these two

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[6] The court of appeals acknowledged this aspect of the ruling in *Wygant*. See J.S. App. 8a. But the court of appeals' illustrations of the kinds of evidence that it would require before concluding that the City had a "firm basis" reveal that in fact it insisted on far more specific findings of prior discrimination than any of the opinions in *Wygant* would have required in this case. See J.S. App. 8a: "There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool."

percentages is simply not probative of discrimination in the hiring of teachers. See *id.* at 1847 (plurality opinion); *id.* at 1857 (opinion of O'Connor, J.). By contrast, as we have explained, Richmond relied on a dramatic statistical disparity that is highly probative of discrimination.

Second, the affirmative action plan in *Wygant* resulted in layoffs of non-minority employees whose seniority would otherwise have protected them. This aspect of *Wygant* was crucial to the outcome of that case. See 106 S. Ct. at 1849-1852 (opinion of Powell, J.); *id.* at 1857-1858 (White, J., concurring in the judgment). See also *id.* at 1857 (O'Connor, J., concurring). Members of the Court stressed the hardship that such layoffs inflict and compared it to the more "diffuse burden" imposed by affirmative action in hiring and school admissions. *Id.* at 1851 & n.11 (opinion of Powell, J.).

The burdens imposed on non-minorities by the Richmond Plan are in no way comparable to those imposed by affirmative action in layoffs; at most, they resemble the burdens that may result from affirmative action in hiring. See *Fullilove*, 448 U.S. at 484-485 (opinion of Burger, C.J.); *id.* at 514-515 (Powell, J., concurring). There is no reason to believe that any burdens imposed by the Richmond Plan on non-minority businesses will be concentrated on a few enterprises. And far from uprooting settled expectations acquired through years of seniority, the Richmond Plan threatens only the contingent possibility of future economic gain—an interest that, as this Court has emphasized, is entitled to only minimal legal protection. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979); cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976).

4. The court of appeals' decision has very substantial implications for state and local governments, and for the values of federalism. Literally hundreds of state and

local governments have minority set-aside programs comparable to the Richmond Plan. As we have noted (Motion and page 5, *supra*), the legislative "records" of many of these programs were developed in reliance on *Fullilove*. The unreasonable and impractical nature of the requirements imposed by the court of appeals in this case is, therefore, likely to threaten a large percentage of these programs.

In addition, many federal grant programs contain minority set-aside requirements with which state and local governments must comply if they are to receive federal funds. See Motion note 5 and accompanying text, *supra*. The effect of the court of appeals' decision is to establish a double standard: federal programs, including those with which state and local governments must comply, are judged under *Fullilove*, while the programs of state and local governments themselves must meet much more burdensome requirements.

Consequently, if the court of appeals' approach prevails, state and local governments—the governments most familiar with both the problems of past discrimination and the best means of remedying it—will often be precluded from taking the remedial action they consider most appropriate; but they will be required to implement remedial measures designed by the remote and less knowledgeable federal government. This substantial and unwarranted adverse impact on the values of federalism is in itself a sufficient reason for plenary review in this case.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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